

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

CITIZENS FOR CONSUME, et al . CIVIL ACTION NO. 01-12257-PBS  
Plaintiffs .  
V. . BOSTON, MASSACHUSETTS  
 . JUNE 9, 2011  
ABBOTT LABORATORIES, et al .  
Defendants .  
. . . . .

**TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE MARIANNE B. BOWLER  
UNITED STATES MAGISTRATE JUDGE**

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P R O C E E D I N G S

THE COURT: Anyone else?

MR. HAVILAND: Judge, this is Don Haviland, Haviland Hughes, on behalf of certain named consumer plaintiffs.

THE COURT: Other participants?

MS. TABACCHI: Good afternoon, Your Honor, Tina Tabacchi on behalf of Track II defendant Abbott Laboratories.

THE COURT: Thank you.

MR. BARLEY: Your Honor, Steven Barley on behalf of Track II defendant, Amgen Inc.

THE COURT: Thank you.

MR. MUEHLBERGER: James Muehlberger on behalf of Track II defendant, Aventis Pharmaceuticals.

THE COURT: Thank you.

MR. KATZ: Cliff Katz on behalf of Track II defendant, Dey.

THE COURT: Thank you.

MR. PENTZ: John Pentz on behalf of objectors Connick and Pentz.

THE COURT: Thank you.

MR. PATEL: Shamir Patel on behalf of Baxter Healthcare.

THE COURT: Thank you.

MR. HURST: Andrew Hurst on behalf of Fujisawa.

THE COURT: Thank you.

1 MR. DOSS: And, Your Honor, Mike Doss on behalf of  
2 Track II defendant Bayer.

3 THE COURT: All right, does that conclude the rest?  
4 I think it does. Well counsel I appreciate your quick response  
5 to the clerk's notice of this emergency hearing. We are here  
6 to be heard on Docket Entry 7590 which was filed on the sixth  
7 of June. Obviously the time for the objection has not run but  
8 because of the relevancy of the dates it was urgent that we  
9 resolve this matter as quickly as possible prior to tomorrow  
10 and Monday's hearing. So I will hear class counsel.

11 MS. TABACCHI: Thank you, Your Honor, and we do want  
12 to thank you for holding this hearing on such short notice. We  
13 filed this motion because on the close of business on June 6<sup>th</sup>  
14 Mr. Haviland served 10 notices to appear the June 13<sup>th</sup> Track II  
15 final approval hearing. He served them on the four  
16 associational Class 1 plaintiffs, on Health Care For All where  
17 Your Honor has granted its motion to withdraw, on consumer  
18 allocation counsel and also on the four consumer Class 1  
19 representatives. All of those notices saying that the  
20 recipients may be subject to sanctions authorized by the  
21 Federal Rules of Civil Procedure if they fail to appear. Mr.  
22 Haviland likewise told the consumer representatives that their  
23 testimony could be stricken and that their application for the  
24 appointment as class representatives could be denied if they  
25 fail to appear. They were likewise instructed to bring with

1 them a variety of documents and the nature of the documents  
2 depended upon the type of entity or person whose attendance was  
3 sought.

4           In addition to the notices to attend, Mr. Haviland  
5 likewise served a notice of deposition on the four Class 1  
6 consumer representatives and asked them to appear in  
7 Philadelphia on Friday June 10<sup>th</sup>. That notice of deposition  
8 also sought documents from those recipients including documents  
9 related to their payments for Track II drugs and their  
10 communications with class counsel in this case.

11           Mr. Haviland did not seek leave for any of this  
12 discovery. As Your Honor's recent June 8<sup>th</sup> order made clear  
13 with regard to the depositions of the consumer plaintiff Mr.  
14 Haviland needed to make a motion specifying the nature of the  
15 discovery he was going to seek. And your order, Your Honor, is  
16 consistent with what Section 21.643 of the manual for complex  
17 litigation says which says that discovery by objectors, which  
18 Mr. Haviland is here, should be minimal and conditioned upon a  
19 showing of need. Mr. Haviland hasn't and cannot make such a  
20 showing. So for this reason the manual also instructs that a  
21 court should monitor post settlement discovery by objectors and  
22 limit it to providing objectors with information that is  
23 central to evaluating the fairness of the proposed settlement.

24           Now because Mr. Haviland didn't file a motion for  
25 this discovery it's difficult to determine why he claims to

1 need it. But we can surmise by his document request that he  
2 appears to want to talk about several things. First, the drugs  
3 that the representatives took there's no need for discovery  
4 about this. In filing our motion to add these class  
5 representatives, Your Honor, which is docket No. 7572, we  
6 submitted declarations from these individuals which attached  
7 data from CMS, the agency that administers the Medicare and  
8 Medicaid programs, substantiating that they had taken Track II  
9 drugs. So there's no need to second guess those records and  
10 Judge Saris has never required such second guessing for class  
11 representatives particularly in the settlement context.

12           The second thing he seems to inquire about is the  
13 relationship between class counsel. To the extent these  
14 communications aren't protected by the attorney-client  
15 privilege, which obviously most of them would be, there's  
16 simply no evidence of collusion between these class  
17 representatives and class counsel or any other evidence that  
18 would suggest that Mr. Haviland would be permitted to probe  
19 into those communications.

20           Finally, he seems to seek discovery related to their  
21 involvement in the case. Although it's very unclear what this  
22 means for two of these class representatives they were recently  
23 added and that's been deemed just fine by Judge Saris because  
24 she recognizes that these class representatives representing  
25 sick and dying class where it is extremely difficult to get

1 class representatives and so she has allowed us to add them on  
2 late notice. So there's no need to seek discovery on these  
3 topics. Indeed Judge Saris has previously rejected similar  
4 attempts by Mr. Haviland to do this. Most specifically and  
5 most importantly with regard to the BMS hearing Mr. Haviland  
6 served notices to attend on Agnes Swayze, a consumer class  
7 representative for the BMS settlement as well as a consumer  
8 class representative for this settlement as well as another, a  
9 number of other individuals and entities and Judge Saris issued  
10 a procedural order which is Docket No. 7472 stating that the  
11 people who had received the notice weren't required to attend  
12 the hearing and that she would not hold an evidentiary hearing  
13 and final approval. Clearly there's no reason to believe that  
14 she thinks otherwise here. And the notices that Mr. Haviland  
15 served here are identical to the ones that Judge Saris  
16 previously refused to enforce with regard to the BMS hearing.  
17 The only difference was that the first time around Mr. Haviland  
18 personally served these individuals whom he knew to be  
19 represented by class counsel and this time he served the  
20 notices across ECF. Furthermore, Judge Saris has never  
21 permitted Mr. Haviland to have discovery of class  
22 representatives in support of his objection for this or any  
23 other settlement. With regard to this settlement two years ago  
24 she denied him discovery of Muriel Tonacchio because Judge  
25 Saris determined that his fundamental objection to her adequacy

1 was that she had only taken a drug from a single defendant and  
2 Judge Saris believed that to be a legal argument about her  
3 standing where discovery was not appropriate.

4           So, Your Honor, we respectfully submit that Mr.  
5 Haviland's service of these notices is not only inappropriate  
6 but it's sanctionable. As you yourself have pointed out  
7 although class counsel believes there is no basis for discovery  
8 at all at a minimum as an officer of this court Mr. Haviland  
9 needed to have enough respect to file a motion for leave  
10 requesting it. And to do so sometimes more than a week before  
11 the Track II fairness hearing was scheduled to occur. So he's  
12 again, placed the Court in the position of having to deal with  
13 this on an emergency basis when Mr. Haviland's objection to the  
14 Track II settlement has been pending for over two years.

15           Mr. Haviland didn't comply with these rules that all  
16 of us in this court have to comply with. He filed the same  
17 notices to attend that Judge Saris had already struck and he  
18 gave even less notice than he did for the BMS hearing. And  
19 once again he sought discovery from consumer class  
20 representatives where Judge Saris has already denied that  
21 discovery. We respectfully ask Your Honor to grant our  
22 emergency motions to quash both the notices to attend as well  
23 as the notice of deposition and to sanction Mr. Haviland  
24 accordingly.

25           THE COURT: All right, Mr. Haviland, why shouldn't I



1 grant this motion?

2 MR. HAVILAND: Well, Judge, I was in the meeting with  
3 an attorney general here in Pennsylvania this morning. I had  
4 planned on a daylong meeting and got an emergent phone call  
5 that I had to suspend that to come here so I apologize to the  
6 Court, my arguments probably going to be longer than I want it  
7 to be because it's very difficult to be short winded when you  
8 don't have time to prepare. So I have to--

9 THE COURT: Well you filed the motion, you should be  
10 prepared.

11 MR. HAVILAND: I understand, Judge. I got that  
12 motion just a couple of days ago, and I'm going to do my best.

13 THE COURT: Well, you've had time to think about it.  
14 You knew the short schedule and I was, the reason this hearing  
15 is so late is because I was giving you time to file something.

16 MR. HAVILAND: Well, Your Honor, let me address that.  
17 Let me point out that when we left your courtroom we left with  
18 only one piece of information that's relevant to today and that  
19 is that class counsel intended to add some new people. Ms.  
20 Connolly didn't tell you who the people were, didn't tell us or  
21 anything about them. It wasn't until we received a filing on  
22 June 1<sup>st</sup> seeking to add these individuals as purported  
23 representatives for an already settled class. We within three  
24 business days issued both notices for discovery and notices to  
25 attend. I apologize I suppose if 72 hours wasn't quick enough

1 but that was the time it took to turn that issue around. Now  
2 Your Honor's order came down after we had done that. So in  
3 terms of seeking leave we didn't have the direction from Your  
4 Honor at that point in time that a motion needed to be filed  
5 before we could take discovery. And if I had had that I  
6 suppose we would have filed a motion with these notices  
7 attached but we know have a motion teed up Your Honor by the  
8 class counsel which I'm responding to verbally, and I did read  
9 Your Honor's order to ask for some idea of what it is we're  
10 seeking so that's what I would like to get to.

11 Class counsel pointed out these notices were served  
12 on them, not the clients. We need to keep in context here that  
13 this is a very large settlement in a very large case. It's a  
14 \$125 million settlement which will effectively end the  
15 litigation for the entire case Track II which consists of a  
16 couple of dozen companies many of which are represented on this  
17 call. And so we have to take time and think about this issue  
18 very carefully cause the Supreme Court in Amgen told us to do  
19 so.

20 The issue we have before us and class counsel want to  
21 surmise why we're asking questions, well it's very simple.  
22 There's a burden on the part of the movant, class counsel, to  
23 demonstrate that the prerequisites for class certification have  
24 been satisfied. Now this Track II case is different from any  
25 of the other cases that have been cited, BMS included, where

1 the Court certified a litigation class after many, many years  
2 much discovery - the class representatives in those cases, Your  
3 Honor, submitted to very difficult discovery by the defense.  
4 They were deposed once, in the case of some of my clients  
5 twice. They were subjected to the type of scrutiny that you'd  
6 expect in such a high profile case where the stakes are so  
7 great.

8           Class counsel wants the Court to just waive a wand  
9 and not look behind the proffer. And in a moment I want to go  
10 through briefly with you the proffer that's before the Court  
11 Monday. There are affidavits of the individuals who've been  
12 proffered but each of them have attached a settlement document,  
13 a document that came from CMS which simply lists out the drugs  
14 that that Medicare beneficiary received during the course of  
15 their treatment with various drugs. It doesn't answer the  
16 critical question which has been the critical question since  
17 this case was filed and that is, do these individuals have  
18 standing, do they have Article III standing to sue? Lacking  
19 that they don't have standing to settle and this class can't be  
20 certified because the class doesn't have the representation  
21 that it needs to withstand any attack and to know that the  
22 interest of the class were properly represented.

23           Now I'd like to point out, I notice that Mr. Pentz is  
24 on the call and he's an objector. His clients have objected  
25 and I know that class counsel have questioned the standing of

1 certain objectors. So - and they've asked for discovery and  
2 asked questions of those objectors to verify whether they have  
3 standing in the defined class to even ask questions of class  
4 counsel and the class representatives who at the time there  
5 were none, they were the associations. Mr. Pentz didn't have  
6 knowledge of these plaintiffs as I did not. So class counsel  
7 wants to ask questions of objectors but not have their clients  
8 submitted to the same scrutiny. Now my clients went through  
9 that scrutiny, demonstrated that they're in the class and  
10 that's why class counsel haven't challenged their standing to  
11 ask questions and to appear before the Court to ensure that  
12 there's proper adequacy.

13           The Court's order of August 5 or August 2005, it's at  
14 230 F.R.D. 61, and I'd like to read into the record cause we  
15 only have the benefit of the telephone conference but it begins  
16 at I believe page 80. And the Court was writing on Track I but  
17 was speaking also to Track II because in this case everyone has  
18 been guided by the Court's juris prudence from the beginning  
19 especially in terms of class certification. Judge Saris wrote  
20 that Track I defendants have supplemented their submissions by  
21 showing that in *Swanston v. Tab Pharmaceutical Products*, a  
22 parallel proposed class action this Court remanded to the  
23 Arizona state court, the named class representative made no  
24 payments based on AWP and was therefore not a member of the  
25 class he sought to represent. Defendants point out or point to

1 this as proof that extensive individual inquiry is necessary to  
2 determine class membership. Arguably class representatives who  
3 are fully reimbursed suffered no injury.

4 To address this issue when plaintiffs amend the  
5 complaint to propose individual class representatives they  
6 shall allege facts demonstrating typicality and adequacy of the  
7 class representatives and disclose the documents demonstrating  
8 that the proposed class representatives made coinsurance  
9 payments, at least in part, under Medicare Part B based on AWP.  
10 Because plaintiffs state that they have individuals waiting in  
11 the wings the Court will continue to address the other  
12 certification requirements. That's the standard that the Court  
13 imposed in this case and I think it's a proper one. I didn't  
14 read for the Court the references to the cases cited.

15 The *Swanson* reference is actually a case that I was  
16 involved in in state court. Defendants challenged Mr.  
17 Swanson's standing and were able to get summary judgment  
18 against that plaintiff for failure to demonstrate that he paid  
19 based on AWP. In this case the defendants have done the same  
20 thing. Johnson & Johnson challenged the standing of a proposed  
21 representative of the class, the subclass against that company  
22 at document 7259 of the docket. And Judge Saris agreed and  
23 found that although the Court, and I'm reading from the order  
24 at Docket 7483 relating to the plaintiffs' proposal of Mrs.  
25 Jimmie, J-I-M-M-I-E, Oustad O-U-S-T-A-D, as a new

1 representative. The Court wrote and I quote, "The Court made a  
2 provisional finding that she was an adequate class  
3 representative for Class 1 of the Johnson & Johnson subclass.  
4 After reviewing Mrs. Oustad's medical records defendants filed  
5 a motion challenging her adequacy as a class representative  
6 because she cannot demonstrate that she paid for remicade or  
7 procrit during the class period." Skipping down, they concede  
8 that they quote, this is class counsel being quoted, "have been  
9 unable to locate written records demonstrating that Mrs. Oustad  
10 took remicade prior to May of 2004. Accordingly the Court  
11 finds that plaintiffs have not demonstrated that Ms. Oustad is  
12 an adequate class representative under Federal Rule of Civil  
13 Procedure 23(a)."

14           The question before the Court that's not been  
15 answered by the motion is why a former client, in the case of  
16 my client of class counsel can't ask the same question that  
17 defense counsel has asked repeatedly in this case. In  
18 preparing for a response to this motion we pulled some of the  
19 opposition by the defendants to the litigation class  
20 certification in this case and I read most interestingly  
21 Bayer's opposition and Mr. Doss, their counsel's on the phone  
22 challenging that there's been no adequate demonstration that  
23 any plaintiff either bought or paid for a Bayer drug. For  
24 class counsel to sustain their burden of class certification  
25 under Track II they will have to demonstrate that an individual

1 within Class 1 bought a Track II drug for each of the subclass  
2 defendants and that they paid based on AWP. And each of those  
3 elements is important. It has to be a drug by each of the  
4 Track II defendants. It has to be a payment based on AWP and  
5 there has to be evidence of payment.

6 Now class counsels' motion to add individual  
7 plaintiffs is not before this Court. It's not before you Judge  
8 Bowler. My understanding is that is before Judge Saris. We're  
9 preparing a response to that. Attached to that motion is  
10 affidavits of the various individuals and without burdening  
11 this Court we have questions about some of the representations.  
12 As I represented previously each one attaches the claim form  
13 that they got from the noticed claims administrator in this  
14 case. That doesn't demonstrate any of the requisites that are  
15 required for this proof of standing. It simply shows that the  
16 individuals were Medicare beneficiaries who got drugs listed on  
17 the Track II form. It doesn't demonstrate that they pay based  
18 on AWP any amount of money. So if you look at the affidavit of  
19 Ms. LeDay (ph) at Docket 7572 Ms. Leday attaches nothing  
20 evidencing her representation to the Court that she was  
21 administered Track II drugs and for each of the foregoing  
22 administrations I made a percentage copayment that was not  
23 reimbursed by any insurer. There's been no proffer in that  
24 regard whatsoever.

25 For the other plaintiffs they have attached medical

1 records. I'm looking at the affidavit of Ms. Swayze at 7572-1.  
2 A heavily redacted hospital record demonstrate some drugs by  
3 Jayco but is also shows that the charge was fully paid for  
4 either by Medicare or by a write off of the institution. There  
5 hasn't been a demonstration that any of those drugs were paid  
6 for by the patient. In fact the document, which is document  
7 four of 13 of that attachment shows the balance owing as zero  
8 and under patient amount it says zero.

9           The other affidavits are similar. I won't burden the  
10 Court. There's an issue about when these folks paid. In the  
11 case of Ms. Truskey (ph), who's represented by her husband, the  
12 payments that I believe class counsel will rely upon on Monday  
13 were made in 2004 after the class period, the punitive  
14 heartland period in this case was established by the Court, and  
15 there's been no effort demonstrate any payment for the earlier  
16 period where there's one reference in the records, and I  
17 apologize Your Honor, that's affidavit at 7572-2. The record  
18 appears as Exhibit 2. And if you look at page 13 of 16 of the  
19 affidavit there is a reference to the administration of  
20 doxorubicin which I believe class counsel contend is one of the  
21 Track II defendants' drugs. But when it says you may be billed  
22 \$571.73 someone wrote in handwriting, we can only presume that  
23 it was Mr. Truskey or his now deceased wife, paid by Empire,  
24 which again I can only assume is the supplemental carrier  
25 that's referenced in the affidavit.



1           Getting to the point of the motion for a protective  
2 order - if we're not permitted discovery and we sent these  
3 notices out earlier in the week asking that we get, maybe even  
4 Mr. Truskey, who's a Pennsylvania resident, to appear at his  
5 counsel's office I read in the paper there was an objection to  
6 that, then we'll have to try to examine them at the fairness  
7 hearing. I think Your Honor knows that the Track II case has  
8 been going on for quite a while. There have been multiple  
9 proceedings beginning from the time the case was first settled  
10 many years ago. There was a reference to the hearing  
11 transcript of April 27, 2009 and I believe this was also  
12 referenced in the hearing where I was before you previously on  
13 the HCFA motion to withdraw.

14           Judge Saris at page 75 when Mr. Berman represented  
15 that there shouldn't be any deposition - I'll read into the  
16 record the colloquy. Judge Saris asks, "So you didn't want to  
17 make her available for deposition?" Mr. Berman wrote, "I did  
18 not, I mean and the reason is simply that we have put forth a  
19 good faith basis sworn statements, a letter which is Exhibit A  
20 to my declaration from the clinic saying that she paid for a  
21 Part B Medicare drug so she's made a showing. Now Mr. Haviland  
22 asks for lots of discovery. He's asked for a deposition. The  
23 Court said he's asked for a deposition of Pal and Every (ph)  
24 and the Court says, no, no, no, no, we're not doing that. But  
25 the deposition of the class rep is a pretty standard thing."

1           The issue is if there's not going to be a deposition  
2 of the class rep which is a pretty standard thing and has been  
3 standard throughout the course of this litigation then when  
4 will we get the inquiry? If it has to take place at any time  
5 it would have to take place at the fairness hearing. Otherwise  
6 the court is being asked to take an affidavit at face value,  
7 affidavits which don't even answer material questions that need  
8 to be answered by the court to find adequacy.

9           I want to direct the Court to a case that underscores  
10 the importance of the inquiry at this stage of the proceedings.  
11 It's a case by Judge O'Toole, a Westlaw decision, 1998 Westlaw  
12 148832 called *Barboza, B-A-R-B-O-Z-A, v. Ford Consumer Finance*  
13 *Company Inc.* And I commend that to the Court to review. The  
14 Court, this Court underscored the fact that Amgen changed the  
15 rules in terms of how plaintiffs and defendants viewed class  
16 action settlements as opposed to litigation. And I want to  
17 read the last part of the opinion which is operative to today's  
18 purposes. Before Amgen when the provisional certification of  
19 this class was given it was possible to think that settlement  
20 classes could be analyzed differently from litigation classes.  
21 Amgen has dispatched that thought. The only difference in the  
22 evaluation of a proposed class is that in the settlement  
23 context the Court need not consider the litigation  
24 manageability of the class but that does not mean that  
25 settlement classes are as a general matter more readily

1 certifiable than litigation classes. Indeed the opposite may  
2 be true and it cites Amgen.

3           In that case the Court denied the settlement class  
4 certification despite the fact that the case had litigated for  
5 a while and had come to an agreeable settlement between class  
6 counsel and defendants which brings me to the point that that's  
7 why heightened scrutiny is called for. It's the last time the  
8 Court will have an opportunity to decide whether or not  
9 interests are adequately protected and this is truly a fair,  
10 reasonable and inadequate outcome. The defendants have joined  
11 with plaintiffs' class counsel. They're supporting the  
12 application. They're now standing on the other side. The  
13 traction can only come from objectors. It can only come from  
14 the former class representatives, my clients, who have asked  
15 these reasonable questions that class counsel remit their  
16 obligations to make an adequate proffer.

17           I ask the Court to allow us some inquiry. There was  
18 a question raised by counsel about what inquiry that's going to  
19 be. I think it's pretty clear in the notices we simply want  
20 billing and payment records, information demonstrating that  
21 these individuals bought and paid for Track II drugs for Track  
22 II defendants. Counsel surmised that there was some other  
23 motivation to it and relied upon, as they do frequently, the  
24 sick and dying class. Well, those folks are the folks I  
25 represent, Your Honor. They're the ones that were the class

1 representatives that were first appointed by the associations  
2 and it's the associations who decided to settle this case, not  
3 any consumer plaintiff. It's the association--

4 THE COURT: All right. I know the gist of your  
5 argument. I'm going to take a minute to confer here. I have  
6 criminal matters waiting and I will give you a prompt ruling.  
7 Just hold on.

8 PAUSE

9 THE COURT: All right, my ruling is as follows. The  
10 motion to quash is granted. It is denied as to that part that  
11 seeks sanctions. I am going to leave the inquiry to Judge  
12 Saris at the hearing. However I will order to the extent that  
13 billing and payment records exist for these individuals to have  
14 them produced, I would say at least two hours before the  
15 hearing noting that this is Thursday and the hearing is Monday.

16 MS. TABACCHI: Your Honor, could I seek some  
17 clarification with regard to that? Is it that you would like  
18 us to serve Mr. Haviland with those or would you like us to  
19 make some proffer through a filing with the Court with these  
20 records?

21 THE COURT: I think they should be served on Mr.  
22 Haviland.

23 MS. TABACCHI: Okay. Thank you.

24 MR. HAVILAND: Your Honor, since I will be travelling  
25 for the fairness hearing can I ask to--

1           THE COURT: Well you work this out. I mean I don't  
2 need to deal with the logistics.

3           MR. HAVILAND: Thank you, Your Honor.

4           THE COURT: All right. My ruling stands. We stand  
5 in recess and again thank you for accommodating the emergency  
6 circumstances. All right.

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## CERTIFICATION

I, Maryann V. Young, court approved transcriber, certify that the foregoing is a correct transcript from the official digital sound recording of the proceedings in the above-entitled matter.

/s/ Maryann V. Young

June 13, 2011

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